of the Criminal Procedure Code, I find that such error, omission or irregularity has not occasioned a failure of justice.

In the premises, the judgment of the lower court cannot be allowed to stand. The learned Deputy Public Prosecutor has urged upon me to adopt a certain course of action in case the appeal is allowed, but for the reasons given on the first two grounds of appeal, it is obvious that this suggested course of action would be inappropriate in the circumstances.

For the reasons given, the appeal is allowed and the order of acquittal of the lower court is set aside. The respondent is ordered to be retried on the same charge before another magistrate. Pending the retrial, he may be released on bail in the sum of $5,000 with one surety in the same sum.

Appeal allowed;

Order for retrial.

Solicitors: *Nassar & Co.*

ABDULLAH BIN SAMAN v. MINAH BINTE IBRAHIM

[A.C.J. (Mohamed Zahir J.) July 18 & October 28, 1981]

[Kota Bharu — Civil Appeal No. 17 of 1976]

Land Law — Small Estate — Dispute — Direction by Collector to institute proceedings in court — Direction to be given to all parties interested — Small Estates (Distribution) Act, 1955, s. 14(4) (5) & (6).

In this case the respondent alleged that one Salleh bin Mamat, since deceased, during his lifetime sold 1/4 share in his land at Mukim Ganong to her. The deceased left two beneficiaries, his widow and the appellant, his nephew. The appellant disputed the sale to the respondent. At the hearing before the Collector, the Collector issued letters of administration to the appellant and Form O to the respondent so that the respondent would be able to sue the appellant in the High Court for specific performance. The respondent however did not institute proceedings in the High Court. The Collector thereupon proceeded to hear the dispute and he gave judgment in favour of the respondent. The appellant appealed and it was submitted that as Form O was only issued to the respondent, the appellant was deprived of the right to bring the matter to the High Court.

Held: as section 14(5) of the Small Estates (Distribution) Act, 1955, requires the Collector to direct all parties to the dispute to institute proceedings in the Court, and as in this case Form O was not issued to the appellant, the order of the Collector must be set aside and the Collector be directed to issue Form O to both the parties.

CIVIL APPEAL.

Datuk Wan Mustapha for the appellant.

Yusof Haji Mohamed Nor for the respondent.

Mohamed Zahir J.: The appellant is appealing against the decision of the Collector, Bachok, given under the Small Estates (Distribution) Act 1955. The facts of the case are as follows. The respondent alleged that one Salleh bin Mamat, since deceased, during his life time sold his land held in Lot No. 510 Mukim Gunong to her to the extent of ¾th shares and to one Mohamad Nor bin Omar to the extent of ¼th share under two separate agreements in writing. The deceased left two beneficiaries: one widow, Mek binti Awang Kechik and the appellant who is a nephew of the deceased. According to the Kathi's faraid, the widow is entitled to ¼th and appellant ¾th shares in the estate. The sale to Mohamad Nor was not disputed by the parties. The appellant is only disputing the sale to the respondent who is the deceased's step-daughter and daughter of the widow, Mek.

The matter first came up for hearing before the Collector on February 12, 1975 and on finding that there was a collateral dispute he issued the letters of administration to the appellant and Form O to the respondent so that the respondent would be able to sue the appellant in the High Court for specific performance. He failed to issue Form O to the appellant.

The respondent, however, did not institute her claim in the High Court on the ground that she was unable to do so. It is not known whether it was on financial reason or for other reasons. The Collector then proceeded to hear the dispute under section 14(4) of the Act and gave judgment in favour of the respondent.

The question is whether the respondent after being given the opportunity to bring the matter into court over an immovable property can refuse to do so or whether such respondent shall have the option whether to institute the suit or not. It appears from the clear wordings of section 14(5) of the Act, the respondent has such a choice. The relevant part of section 14(5) reads as follows:—

"... the Collector shall direct the persons claiming any beneficial right or interest in the property within two months of the date of the direction to institute proceedings in a court with a view to the determination of the dispute by the court and if no such proceedings are instituted within the period the Collector shall proceed to hear and determine the dispute in the same manner as a dispute referred to in subsection (4)."

The appellant's counsel submitted that since Form O was issued to only the respondent, the appellant was deprived of any right to bring the matter into court. Upon reading section 14(5), it appears to be abundantly clear that it is intended that if the beneficial right or interest is in dispute between two or more claimants then the Collector shall direct the persons claiming any beneficial interest in the property to institute proceedings in a court. It appears to include every claimant to such right or interest. It follows therefore the right to institute such proceedings in a court should be given to every such claimant. If none of them institutes such claim, then only the Collector can exercise his powers to proceed to hear the dispute.

Section 14(6) is even clearer in determining that it is incumbent on the Collector to direct the parties to the dispute to initiate proceedings in a court. These words were used:

"... the Collector shall direct the parties to the dispute within two months of the date of the direction to institute proceedings in a court of competent jurisdiction. ..."

In section 14(5) the words "persons claiming any beneficial right or interest" are used, whereas in section 14(6) "the parties to the dispute" are used. It is evidently clear that all parties to the dispute should be issued with Form O. Even under the rules

made the Act, rule 11(5), it shows that every party involved should be issued with Form O. Rule 11(5) reads as follows:

"Where it be necessary to direct the institution of proceedings in court the Collector shall complete the Form O and deliver the same to the parties referred to therein."

Rule 11(6) speaks of "where the parties omit to institute the proceedings in court ...", again indicating that Form O should be issued to every party. Thus, if the Form is issued only to one party then the others would be deprived of the right to do so under the Act.

I am of the opinion that the matter can be conveniently dealt with by the Collector upon determining that there is a collateral dispute by appointing under section 14(7) one of the beneficiaries who disputes any claim to be the administrator limited for the purpose of suing or being sued. Such administrator will then represent the estate and thus will become one party. The administrator should also be issued with Form O. All other claimants to the estate or to any of the assets should be similarly issued with Form O each. The claimants then may sue the administrator for specific performance or for such other order and the administrator may sue the claimants for a declaration that any agreement made between the deceased with the claimant to be void or for any other order. If all of them omit to institute such proceedings then none of them can be heard to say that they have been deprived of the right to have the case adjudicated in a court. The Collector will then proceed to hear the case under section 14(4).

As far as possible, the Collector should appoint one of the beneficiaries who objects to the claim to be the administrator, so as to enable the claimant to claim against such administrator, thereby following the principle that it is the deceased, through his administrator, who is being sued for an obligation incurred during his life time. However, the administrator should be given his right to sue, should he consider that the court is the proper venue for redress instead of the Collector in the event that the claimant fails to institute the proceedings in court.

It also sometimes occurs that when a beneficiary is granted with letters of administration, he will, armed with such letters, try to take possession of the land. This can be remedied by the Collector endorsing on the letters of administration which is in Form F the limitation of use of those letters, that is for the purpose of suing or being sued and for no other purpose. If it is not intended that the administrator is to look after the property or to collect any debts (words to these effects are printed in Form F) then these words should be deleted from the Form.

In the instant case, in view of the fact that Form O was not issued to the appellant, I set aside the order made by the Collector. I direct that the Collector grant letters of administration to the appellant again as he had done before and issue Form O to both the parties. There is no necessity of issuing the form to the other purchaser Mohamad Nor bin Omar since there is no dispute as to his claim.

This is a case where I think there should not be any costs awarded. I therefore order that there shall be no order as to costs and the deposit paid herein by the appellant in the sum of $150 towards costs be refunded to him.

Order accordingly.

Solicitors: *Datuk Wan Mustapha & Co.; Yusof, Idris, Hazzan & Fadzil.*

PUBLIC PROSECUTOR v. ONG KHOON SENG

[A.Cr.J. (Seah J.) October 23 & November 7, 1981]
[Kuching — Criminal Appeal No. KG 3 of 1981]

Criminal Law and Procedure — Summary trial — Whether prosecution has made out a prima facie case — Submission of no case to meet — Practice to allow submission and reply.

Customs — Whether trial court has jurisdiction to discharge and acquit accused on payment of deficient customs duty — Customs Act, 1967, ss. 17 & 135(1)(g).

In this case the respondent was charged with the offence of being knowingly concerned in the fraudulent evasion of customs duty. At the close of the prosecution case while defence counsel was in the process of submitting no case to answer the learned Magistrate stopped him. He noted that there was no provision in the law to say that the court must hear the defence submission at the close of the prosecution case. He then proceeded without hearing the prosecution to rule that the prosecution had failed to make out a *prima facie* case and he acquitted and discharged the respondent. The learned Magistrate then ordered the respondent to pay the undercollection of duty under section 17 of the Customs Act, 1967 and upon payment the car in question to be returned to him. The Public Prosecutor appealed.

Held: (1) in this case on the oral and documentary evidence produced the prosecution had made out a *prima facie* case and the respondent should be called to enter on his defence;

(2) the trial court has no jurisdiction to discharge and acquit the accused on payment of the deficient customs duty. The power under section 135(1)(g) of the Customs Act, 1967, may be exercised by the Customs Department, not by the court;

(3) although there is no express provision in the Criminal Procedure Code permitting a defence counsel to make a submission of no case to answer or for the trial court to hear such a submission at the close of the prosecution case, the practice of the courts has always been to allow defence counsel to make such a submission if he so desires and for the trial court to permit the Deputy Public Prosecutor to reply to such a submission.

Cases referred to:

(1) *Mahindar Singh* v. *Public Prosecutor* [1941] M.L.J. 230.

(2) *R.* v. *Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256.

CRIMINAL APPEAL.

Abang Abdul Rahaman bin Datuk Haji Abdul Rahim (Deputy Public Prosecutor) standing in for *Nik Hashim bin Nik Abdul Rahman* (Deputy Public Prosecutor) for the appellant.

Benedict Lim standing in for *David Tiong* for the respondent.

Seah J.: In this case, the respondent, Ong Khoon Seng, was charged as follows: